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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1093

WALLACE G. WILBUR,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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TABLE OF CONTENTS

Subject Index

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	9
Appendix A	10
Opinion Below	10
Judgment Below	19
Appendix B	20

Table of Citations

Cases

Griffin v. *California*, 380 U.S. 609	8
Miranda v. *Arizona*, 384 U.S. 436	7, 8

Constitutional Provisions

Fifth Amendment to Federal Constitution	3
Sixth Amendment to Federal Constitution	3
Fourteenth Amendment to Federal Constitution	2, 3

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Petitioner Wallace G. Wilbur, by his attorneys, prays that a writ of certiorari issue to review the judgment entered on December 7, 1967, by the Supreme Judicial Court of Massachusetts.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 10, is reported in 1967 Mass. Adv. Sh.

Jurisdiction

The judgment of the court below was entered on December 7, 1967, and is also printed in Appendix A hereto, *infra*, p. 19. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257 (3) since petitioner had specifically set up and claimed certain rights under the constitution of the United States.

Questions Presented

I. Does the failure of police officers to include in their warnings to an arrested defendant the admonition, that if he could not afford an attorney, one would be provided for him prior to any interrogation, require the exclusion of post-arrest admissions, even though the officers had reason to suspect that the defendant was aware of the rights of a person under arrest and was not indigent?

II. Must the prosecution show, before evidence obtained during a post-arrest interrogation can be admitted in evidence against a defendant, not only that the required *Miranda* warning was given, but also that he intelligently and understandably waived his rights to silence and counsel?

III. Does the Fourteenth Amendment, which forbids "instructions by the court that. . .(the accused's) silence is evidence of guilt," also outlaw the addition of the words, "unless he offers a satisfactory explanation as to how those goods came to be in his possession," immediately after an instruction that the defendant's possession of recently stolen goods creates a presumption and is evidence that he is the thief?

Constitutional Provision Involved

Section 1 of the Fourteenth Amendment to the constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth and Sixth Amendments, which are less directly involved, are printed in Appendix B, infra.

Statement of the Case

Petitioner, who was employed by the Commonwealth of Massachusetts as a "natural resource officer" with duties to "enforce the laws, rules and regulations relating to fish, birds and mammals," was convicted under nine separate indictments for breaking and entering summer dwellings in the Plymouth and Wareham (Massachusetts) area with intent to commit larceny and for larceny. (Appendix A hereto, *infra*, p. 10.)

"On Sunday, March 21, 1965, Trooper Waterhouse of the State police requested (petitioner) Wilbur," who lived in Plymouth "to go to the North Dartmouth State police barracks." Wilbur proceeded towards the barracks in his automobile followed by Waterhouse and another officer in a police vehicle. On the way, Waterhouse received a radio

call from his superior, Lieutenant Harrington, asking that they meet him at. . . an antique shop known as the Witch's Brew in North Dartmouth, about thirty miles from his house in Plymouth. "This request was relayed to Wilbur." (Appendix A hereto, *infra*, p. 10.)

When Wilbur and Waterhouse arrived at the Witch's Brew, Lieutenant Harrington handed Wilbur an arrest warrant for him and three search warrants authorizing a search of the Witch's Brew. "Lieutenant Harrington warned Wilbur of his right to counsel, his right to make a telephone call to counsel or friends, his right to remain silent, and that anything he said might be used against him in court." He did not warn Wilbur that if he could not afford an attorney, one would be obtained for him. "Lieutenant Harrington then asked Wilbur to admit them to the shop. Wilbur replied, 'It's all right with me, but I don't have the key.' Thereupon, Lieutenant Harrington went to a side door, which 'was slightly ajar but wired from the inside with one strand of copper wire wound around a nail.' He pushed open the door and, with other police officers, followed Wilbur inside." (Appendix A hereto, *infra*, p. 11.)

"Within one hour and one half after the defendant's arrest, the officers seized some of the allegedly stolen property. More stolen property was seized at the Witch's Brew during the months following Wilbur's arrest under additional search warrants after other victims had identified property seen through the window of the store as belonging to them." (Appendix A hereto, *infra*, p. 11.)

Over petitioner's objections, that his post-arrest admissions should be excluded, not only because he was not fully apprised of his constitutional rights, but also because he did not knowingly, intelligently and voluntarily waive his rights to remain silent and to be represented by counsel, and subject to his exceptions, the trial judge admitted

evidence that immediately after his arrest, Wilbur made admissions to the effect "(1) that the Witch's Brew 'was his. . .establishment,' (2) that he had recently sold the contents and, (3) that he could not recall from whom he had purchased various items in the shop." In addition, when, during the search, one of the victims came into the shop, Lieutenant Harrington asked Wilbur whether he knew the victim. Wilbur denied that he had ever seen him before. When the victim stated in Wilbur's presence that Wilbur had been to his camp on a Sunday in the preceding month, Wilbur replied that the victim was a "god-damned liar," that he didn't even know where the victim's camp was and that he had never been in the area. Wilbur also accused that victim, as well as other victims who were present in the shop, of lying when they claimed ownership of items in the shop. Wilbur then became violent, profane and abusive. (Appendix A hereto, *infra*, pp. 15, 15 fn. 6; Tr.[1] 38-49, 67, 68, 70-74, 132-136, 165-171, 217; S.34.)

Petitioner did not testify at the trial, which commenced on September 21, 1966.

In addition to charging the jury at the conclusion of all the evidence and arguments by counsel, "that Wilbur had a constitutional privilege not to testify and that 'the fact that Wilbur did not take the stand does not give you (the jury) the right to draw an unfavorable inference therefrom,' the trial judge "instructed the jury that, where there is possession of stolen property by a defendant soon after a theft, and the possessor 'offers no explanation as to his possession, there is a presumption (which is evidence) that he stole it.'" To this instruction, petitioner seasonably excepted because so much of the charge, which placed upon the defendant the burden of offering an explanation as to

[1] "Tr." refers to the trial transcript.

his possession upon the defendant contravened his constitutional rights, both state and federal, not to testify (Appendix A hereto, *infra*, pp. 17-18; Tr. 327, 329, 332-333, s. 34).

The jury returned a verdict of guilty under the nine indictments and petitioner was sentenced to be confined for one year in the House of Correction under eight of the indictments, all to be served concurrently, and, under the ninth indictment, was also given a suspended one year House of Correction sentence and placed on probation for two years from and after the other sentences. (S.[2] 36-48.) The trial judge refused to stay the execution of the sentences. However, on petition, a single justice of the Supreme Judicial Court stayed execution of the sentences and admitted petitioner to bail. Petitioner continues to be enlarged on bail.

Petitioner seasonably prosecuted his appeals to the Supreme Judicial Court, briefing and arguing the very three questions presented here.

That Court affirmed the judgments. (Appendix A hereto, *infra*, p. 19.)

In passing upon the first question, the Supreme Judicial Court considered as immaterial the omission to warn the defendant, after his arrest and before interrogation, "that if he . . . (could not) afford an attorney, one . . . (would) be appointed for him." In so concluding, that court said that since petitioner "was in the uniform of a natural resource officer" and "admitted that he owned the Witch's Brew" and that he "had just sold its contents", "there was no reasonable basis for suspecting that he was indigent", there was "every affirmative indication that he was in a position to employ counsel if he wanted an attorney", and, because he was a natural resource officer, "he cannot

[2] "S." refers to the "Summary of Record" in the court below.

be regarded as ignorant of the rights of a person under arrest." (Appendix A hereto, *infra*, p. 16.)

The court made no mention of the second issue.

In dealing with the third question presented here, the Supreme Judicial Court, after pointing out that the trial judge had "charged specifically that Wilbur had a constitutional privilege not to testify and that 'the fact that Wilbur did not take the stand does not give you (the jury) the right to draw an unfavorable inference therefrom,'" held that it did not "view the charge as in any sense an improper comment on Wilbur's failure to testify in violation of Art. 12 of Part I of the Constitution of the Commonwealth, or of G.L. c. 233, s. 20, Third, provisions which long antedated the decision in *Griffin* v. *California*, 380 U.S. 609, 612-615;" and that "a proper and reasonable charge, like the charge before us, concerning the principle cannot be distorted into forbidden comment on a defendant's failure to take the stand." (Appendix A hereto, *infra*, pp. 18-19.)

Reasons for Granting the Writ

I. It is difficult to understand (a) how the court below, in dealing with the first issue presented here, could expect a game warden to be "aware of the rights of a person under arrest" and at the same time excuse police officers for not having anticipated "what was later to be decided" in *Miranda* v. *Arizona*, 384 U.S. 436 (1966); or (b) how the court below could excuse the omission to give the petitioner the full *Miranda* warning by the very admissions improperly elicited during his post-arrest interrogation. More importantly, the court's holding ignored the express and implicit teachings of this Court, that no court should "pause to inquire in individual cases whether the defendant was aware of his rights" or whether he could afford to

engage an attorney and that neither a defendant's knowledge nor wealth could serve as a justification for the failure to give the complete *Miranda* warning. Surely, neither knowledge nor wealth are sufficient to overcome the pressures of an accused's arrest and interrogation and "to insure that he is free to exercise the privilege at that point in time." *Miranda* v. *Arizona*, 384 U.S. at 468-469.

II. Although petitioner challenged in the trial court, as well as in the court below, the admission of evidence obtained as a result of his post-arrest interrogation, "not only on the grounds that he was not fully apprised of his constitutional rights," but also because he had not "knowingly, intelligently and voluntarily waive(d) his rights to remain silent and to be represented by counsel" (S. 34; Tr. 68-70, 72-74, 133, 165, 167, 169, 171, 217), the court below disregarded completely that question. Possibly, it was of the mistaken view that once the *Miranda* warning is given, an appellate court has no obligation to ascertain from the record whether the "accused intelligently and understandingly rejected the offer of counsel." *Miranda* v. *Arizona*, 384 U.S. at 475. More likely, it realized not only that the record failed to show any such rejection, but also that any finding that the defendant had waived his Fifth and Sixth Amendment rights would be completely inconsistent with the judge's implicit finding, on petitioner's pre-trial motion to suppress, that he had not waived his Fourth Amendment rights. In any case, the court below was wrong.

III. It seems to petitioner that a trial judge can no more comment on a defendant's failure to explain his possession of recently stolen goods than on a defendant's failure to testify as to facts peculiarly within his knowledge —a comment which, according to *Griffin* v. *California*, 380 U.S. 609, 614-615 (1965), is forbidden by the Fourteenth Amendment. On two separate occasions, immediately after

instructing the jury that the defendant's possession of recently stolen goods creates a presumption and is evidence that he is the thief, the trial judge added the words "unless he offers a satisfactory explanation as to how those goods came to be in his possession." The addition of those words constituted the court's solemnization of "the silence of the accused into evidence against him"—a solemnization which is condemned by the *Griffin* case.

IV. Not only is the decision of the court below in conflict with *Miranda* v. *Arizona* and *Griffin* v. *California*, but its opinion discloses a readiness—not too uncommon among state courts—to view too narrowly the teachings of this Court. It is essential, it seems to petitioner, that this Court make clear that its decision must be given a liberal construction by all courts if the rights of privacy, silence and counsel are to be preserved.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

P-13,827

COMMONWEALTH *v.* WALLACE G. WILBUR

CUTTER, J. Wilbur was employed by the Commonwealth as a "natural resource officer." See G.L. c. 21, §§ 1, 6, 6A-6E, as amended. He was convicted under nine[1] separate indictments for breaking and entering summer dwellings in the Plymouth and Wareham area with intent to commit larceny and for larceny. The trial was conducted under G.L. c. 278, §§ 33A-33G, as amended. Wilbur appealed. Further facts are stated in connection with particular assignments of error.

1. Prior to trial Wilbur moved to suppress certain evidence obtained by searches which he claimed were "unreasonable and in violation of" his constitutional rights. At the hearing on the motion, the following facts were found.

Wilbur operated an antique shop known as the Witch's Brew in North Dartmouth, about thirty miles from his house in Plymouth. On Sunday, March 21, 1965, Trooper Waterhouse of the State police requested Wilbur to go to the North Dartmouth State police barracks. Wilbur proceeded toward the barracks in his automobile followed by Waterhouse and another officer in a police vehicle. On the way, Waterhouse received a radio call from his superior, Lieutenant Harrington, asking that they meet him at the Witch's Brew. This request was relayed to Wilbur.

Several days earlier on two separate occasions two of the alleged victims of the thefts had visited the Witch's Brew, and, from the sidewalk through the glass front of the shop, had observed some property belonging to them. On this evidence, on March 19, 1965, Trooper Waterhouse

[1] In three other indictments charging the same two offences, the trial court directed verdicts of not guilty.

obtained three search warrants (from the Third District Court of Bristol) authorizing a search of the Witch's Brew, and on March 20, 1965, obtained an arrest warrant for Wilbur from the Fourth District Court of Plymouth.

When Wilbur and Waterhouse arrived at the Witch's Brew, Lieutenant Harrington had these warrants in his possession and handed them to Wilbur. Lieutenant Harrington warned Wilbur of his right to counsel, his right to make a telephone call to counsel or friends, his right to remain silent, and that anything he said might be used against him in court. Lieutenant Harrington then asked Wilbur to admit them to the shop. Wilbur replied, "It's all right with me, but I don't have the key." Thereupon, Lieutenant Harrington went to a side door, which "was slightly ajar but wired from the inside with one strand of copper wire wound around a nail." He pushed open the door and, with other police officers, followed Wilbur inside.

Within one hour and one half after the defendant's arrest, the officers seized some of the allegedly stolen property. More stolen property was seized at the Witch's Brew during the months following Wilbur's arrest under additional search warrants obtained from the Third District Court of Bristol after other victims had identified property seen through the window of the store as belonging to them.

The judge who heard Wilbur's motion to suppress ruled among other things: (a) Wilbur was lawfully arrested at 10:30 A.M. on March 21, 1965, on the street immediately in front of the Witch's Brew. (b) The search of the Witch's Brew on March 21 and the seizure of stolen property described in the three warrants given by Lieutenant Harrington to Wilbur were incident to a lawful arrest.[2] (c) All search warrants issued by the Third

[2] Wilbur's motion sought the suppression of: (a) everything seized in the Witch's Brew on or after March 21, 1965; (b) all observations

District Court of Bristol were defective because they lacked the teste of the first justice of that court.

Reasonable searches may be made without a warrant if incident to a lawful arrest. *Commonwealth* v. *Holmes*, 344 Mass. 524, 525-526.[3] This arrest took place in the immediate vicinity of, and in front of, the Witch's Brew which exhibits show to be a small glass structure, little more than a shed. Its walls consisted chiefly of large windows such as are usual in a greenhouse. Much of the interior appears to have been visible from outside the building. The interior was not well secured. It seems probable that the searches were so close in place and time to Wilbur's arrest that they were incidental to it within the cases cited (fn. 3). This we need not decide for the evidence was admissible on another ground.

With respect to all the contents of this structure seized and admitted in evidence, search warrants had been issued by the Third District Court of Bristol. We are not bound by the reasons given for the ruling by the judge (see *Randall* v. *Peerless Motor Car Co.*, 212 Mass. 352, 384; *Young* v. *Duncan*, 218 Mass. 346, 351) who heard the motion

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and photographs made within the Witch's Brew on March 21, 1965; (c) all admissions made there by Wilbur; and (d) all observations made from within or without the Witch's Brew after March 21, 1965. Except for the articles seized incident to the lawful arrest, the motion to suppress was allowed as to all articles seized under warrants issued by the Third District Court of Bristol as well as to all evidence of observations of them which took place inside the shop.

[3] Cases which indicate what searches may be regarded as incidental to arrest include *Commonwealth* v. *Dixon*, 352 Mass. , (Mass. Adv. Sh. [1967] 703, 706), and *United States* v. *Rabinowitz*, 339 U.S. 56, 60-64 (search of the desk and file cabinets in one room where arrest occurred). See *Commonwealth* v. *Laudate*, 345 Mass. 169, 172-173; *Commonwealth* v. *Jacobs*, 346 Mass. 300, 310; *Commonwealth* v. *Ballou*, 350 Mass. 751, 756; *Commonwealth* v. *Bowlen*, 351 Mass. 655, 657-658 (Mass. Adv. Sh. [1967] 179, 180-182). Cf. *Commonwealth* v. *Rossetti*, 349 Mass. 626, 633-634; *Preston* v. *United States*, 376 U.S. 364, 367; *Stoner* v. *United States*, 376 U.S. 483, 486-487; *James* v. *Louisiana*, 382 U.S. 36, 37.

to suppress. We think that he erred in ruling that these warrants were not valid because they lacked the teste of the first judge of the District Court. The searches were valid if made pursuant to a valid warrant.

The presence of the teste is directed by Part II, c. 6, art. 5, of the Constitution of the Commonwealth,[4] if a search warrant is a "writ" as the term is used in art. 5. A more specific provision appears in G.L. c. 218, § 6 (as amended through St. 1964, c. 638; see later amendments through St. 1966, c. 699, § 6), which reads, in part, "Citations, orders of notice, writs, executions and all other processes issued by the clerk of the court shall bear the teste of the trial justice thereof." The section deals primarily with the justices and special justices of such courts and their compensation. No provision for a teste appears in G.L. c. 276, §§ 1, 2, 2A, 2B, 2C (as amended or inserted by St. 1964, c. 557; see later amendment of § 2B by St. 1965, c. 384). Indeed, the form of warrant specified in § 2A omits any teste whatsoever.

We interpret both the constitutional provision (fn. 4) and c. 218, § 6, as directory only (see *Liberty Mut. Ins. Co.* v. *Acting Commr. of Ins.*, 265 Mass. 23, 28-29; *Monico's Case*, 350 Mass. 183, 185-186) and not as a mandatory requirement, the absence of which destroys the validity of a warrant otherwise correctly issued. The teste relates to a matter of form and not of substance. As Chief Justice Parker said in *Ripley* v. *Warrant*, 2 Pick. 592, 595, "[N]othing can be more precisely mere matter of form

[4] Article 5 reads, "All writs issuing out of the clerk's office in any of the courts of law, shall be in the name of the Commonwealth of Massachusetts: they shall be under the seal of the court from whence they issue: they shall bear test of the first justice of the court to which they shall be returnable, who is not a party, and be signed by the clerk of such court." Article 14 of the Declaration of Rights (dealing with the regulation of the right of search and seizure) provides, among other things, that "no warrant ought to be issued but in cases, and with the formalities prescribed by the laws."

than the *teste* of a writ, although by some unaccountable means it was thought important enough to be provided for in the constitution of the state. We all know that in practice it is considered wholly insignificant; for the name of the proper officer may be inserted after the writ has been issued by the clerk, a blank being left for that purpose; or the name, if printed, may be erased and another inserted by the party . . . ." In the *Ripley* case, the court (p. 596) treated the writ, "though originally defective," as agreed to by the then defendant who made no point of the matter until late in that litigation. The teste of a writ may be amended at any stage in a proceeding. *Nash* v. *Brophy,* 13 Met. 476, 478. See *Austin* v. *Lamar Fire Ins. Co.,* 108 Mass. 338, 339-341 (clerk's signature omitted from writ). See also *Commonwealth* v. *Boon,* 2 Gray 74, 75.

The record does not suggest that any interest of Wilbur was affected by the absence of the teste. If he had questioned the authenticity of the warrant on that account, when it was shown to him, it could have been amended on the spot in this insignificant respect, at least with authorization to do so from the clerk who issued it. Examination of the original warrants shows that they were adequately authenticated by the signature of the assistant clerk and by the impressed seal of the court.

The use of search warrants is desirable to protect important individual interests. They, however, and the affidavits upon which they are based, must be read "in a common-sense way rather than technically." *United States* v. *Ventresca,* 380 U.S. 102, 108-109, 111-112. See *Commonwealth* v. *Rossetti,* 349 Mass. 626, 632, n. 5; *Commonwealth* v. *Cuddy,* Mass. , ;[a] *United States* v. *Bowling,* 351 F.2d 236, 237 (6th Cir.). We treat the absence of

[a] Mass. Adv. Sh. (1967) 1475, 1477.

the teste as of no legal significance,[5] especially in circumstances such as those before us where it is apparent that omission of the teste was an inadvertence which occurred when the warrant blanks (then currently in use by the court) were printed.

2. The trial judge admitted evidence that, immediately after his arrest, Wilbur made statements which could be found to have constituted admissions.[6] It is principally argued that Wilbur's constitutional rights were violated by some brief interrogation of, and short conversations with, Wilbur after his arrest, while he and the others were within the Witch's Brew on March 21, 1965, the day of the arrest. Principal reliance is placed on *Miranda* v. *Arizona*, 384 U.S. 436, 467-479, decided June 13, 1966. Wilbur's trial began on September 21, 1966. We assume (without deciding) that the principles formulated in the *Miranda* case may apply to this trial, even though such interrogation as there was took place long before the *Miranda* decision. *Johnson* v. *New Jersey*, 384 U.S. 719, 721. Cf. *Commonwealth* v. *Morrissey*, 351 Mass. 505, 508-

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[5] Our view is consistent with analogous decisions elsewhere. See *United States* v. *Matellian*, 31 F. R. D. 233, 234 (D. Mass.—correction of date in warrant); *People* v. *DeGeovanni*, 326 Ill. 230, 236-237 (warrant did not disclose the title of the issuing officer); *Spitcaufsky* v. *Hatten*, 353 Mo. 94, 114 (constitutional provision concerning attestation of process "more directory than mandatory"); *Parsons* v. *Swett*, 32 N.H. 87, 89; *Burks* v. *State*, 194 Tenn. 675, 678-679 ("technical irregularity" in warrant not to "defeat the ends of justice").

[6] The admissions do not appear to have been very substantial. They included statements (1) that the Witch's Brew "was his [Wilbur's] establishment," (2) that he had recently sold the contents and, (3) that he could not recall from whom he had purchased various items found in the shop. Wilbur also, while in the shop accused theft victims there present, who had claimed ownership of items in the shop, of lying. He also denied ever having been near the house of one or more of such house owners. During the stay in the shop, Wilbur became violent, profane, and abusive. There was no evidence of any improper police pressure upon Wilbur. The questioning was neither insistent nor long continued.

512;[b] *Commonwealth* v. *Rogers,* 351 Mass. 522, 528-531.[c]

In the *Miranda* case, at p. 479, it was stated that person arrested "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." The judge who heard the motion to suppress found that Lieutenant Harrington warned Wilbur "of his right to counsel, and to telephone counsel or friends and that anything he might say might be used against him in court." He was told he could use a telephone in the police barracks nearby, for there was no telephone in the shop. The only element of the *Miranda* case warning not given was "that if he ... [could not] afford an attorney one ... [would] be appointed for him."

We hold that this omission is not material here and that the warning was adequate. Wilbur was in the uniform of a natural resource officer employed by the Commonwealth. He admitted that he owned the Witch's Brew and had just sold its contents. There was no reasonable basis for suspecting that he was indigent and every affirmative indication that he was in a position to employ counsel if he wanted an attorney. He was a law enforcement officer who (see G.L. c. 21, § 6B, as amended through St. 1964, c. 524, § 2) could "exercise ... all the authority of police officers and constables, except the service of civil process." He cannot be regarded as ignorant of the rights of a person under arrest.[7] We think the warning principles announced in the *Miranda* case must be applied reasonably and with

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[b] Mass. Adv. Sh. (1967) 11, 13-16.

[c] Mass. Adv. Sh. (1967) 29, 33-36.

[7] Although it may not be material, we take note that he is now represented by competent and experienced counsel.

common sense and do not constitute an arid, ritualistic formula to be administered inflexibly. We assume that the principles are designed to achieve the substance of protection of defendants requiring protection and not to penalize (for minor and nonprejudicial failure to adhere to a precise formula) law enforcement officials intelligently attempting in good faith to afford arrested persons considerate treatment and due process of law. Particularly must this be so, when action which occurred before the *Miranda* decision (so that police officers could not anticipate what was later to be decided), is being considered in connection with a trial begun after that decision.

At least one other court considering the problem has reached a similar conclusion, where there plainly was no prejudicial effect from failure to inform a defendant that, if indigent, counsel would be appointed for him. *State* v. *Gray*, 268 N.C. 69, 80-83. We think that any incompleteness in the warning given to Wilbur was, on the facts in this record, "harmless beyond a reasonable doubt." See *Chapman* v. *California*, 386 U.S. 18, 24.[8]

3. The trial judge gave a full and accurate charge. Among other things, he instructed the jury that, where there is possession of stolen property by a defendant soon after a theft, and the possessor "offers no explanation as to his possession, there is a presumption that he stole it." Such possession, he said, "if no explanation is given, or an unsatisfactory account is given, is presumptive evidence of guilt."[9] To this portion of the charge Wilbur's

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[8] We, of course, do not suggest that police officers should not give the full *Miranda* case warning merely because they know a particular defendant to be abundantly solvent. On the contrary, we think that the only safe course for law enforcement officers is to apply the rules of the *Miranda* decision, even if in the particular case attention to some aspect of those rules may seem unnecessary as a practical matter.

[9] He also said that "the mere possession of stolen goods . . . gives you the right to draw an inference that they were stolen . . . and

attorney made an objection which we assume to have been an exception, although it is by no means clear that an exception in fact was saved. This objection was not based upon the contention that the judge had "misstated the Massachusetts law on this subject" but on the ground that the charge violated the constitutional privilege "which enables a defendant to remain silent in the face of any accusation." The judge charged specifically that Wilbur had a constitutional privilege not to testify and that "the fact that Wilbur did not take the stand does not give you [the jury] the right to draw an unfavorable inference therefrom."

The charge concerning the presumption which arises from the unexplained possession of recently stolen goods was consistent with our cases. *Commonwealth* v. *Grace,* 265 Mass. 119, 123-124. *Commonwealth* v. *Torrealba,* 316 Mass. 24, 29. *Commonwealth* v. *Brant,* 346 Mass. 202, 205. Cf. *Commonwealth* v. *Fancy,* 349 Mass. 196, 200 (where it was not established that the defendant ever had any stolen property in his possession). Similar presumptions or permissible inferences were upheld in *Yee Hem* v. *United States,* 268 U.S. 178, 183-185, and *United States* v. *Gainey,* 380 U.S. 63, 65-68, 70-71. See *Commonwealth* v. *Williams,* 171 Mass. 461, 462-463. Cf. *United States* v. *Romano,* 382 U.S. 136, 139-144.

We do not view the charge as in any sense an improper comment on Wilbur's failure to testify in violation of art. 12 of Part I of the Constitution of the Commonwealth, or of G.L. c. 233, § 20, Third, provisions which long antedated the decision in *Griffin* v. *California,* 380 U.S. 609, 612-615. See *Opinion of the Justices,* 300 Mass. 620, 624-626. The presumption or inference of guilt arising from unexplained possession of recently stolen goods may be

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particularly so when you . . . have not an explanation, a satisfactory explanation, as to how the defendant came in possession of them."

overcome by evidence other than that of the defendant. Indeed, facts proved by the prosecution may be sufficient to overcome the presumption or to preclude any adverse inference. A proper and reasonable charge, like the charge before us, concerning the principle cannot be distorted into forbidden comment on a defendant's failure to take the stand. The pertinent authorities are comprehensively discussed in *Anglin* v. *State,* 244 Md. 652, 656-663.

Judgments affirmed.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, December 7, 1967.

IN THE CASE OF

COMMONWEALTH

v.

WALLACE G. WILBUR

pending in the Superior Court for the County of Plymouth

ORDERED, that the following entry be made in the docket; viz.,—

Judgments affirmed.

BY THE COURT,

(s) RICHARD A. McLAUGHLIN, *Clerk*

December 7, 1967.

A TRUE COPY. ATTEST:

(s) ROBERT S. PRINCE, *Clerk*

(SEAL)

(Over)

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

Appendix B

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 1093.

WALLACE G. WILBUR,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of the Case.

Petitioner, Wallace G. Wilbur, was convicted in the Plymouth Superior Court for the Commonwealth of Massachusetts under nine indictments for breaking and entering summer dwellings with intent to commit larceny and for larceny (P. App.[1] A, p. 10). At the time of his arrest he was employed by the Commonwealth as a "natural resource officer." As such he was empowered to "exercise . . . all the authority of police officers and constables, except the service of civil process." Mass. G.L. c. 21, § 6B (as amended by St. 1964, c. 524, § 2).

Petitioner was arrested on March 21, 1965, by a state police officer at an antique shop owned by petitioner (P. App. A, pp. 10-11). He was handed a validly issued arrest

[1] "P. App." refers to the Appendix to the Petition.

warrant and three validly issued search warrants authorizing a search of the antique shop (P. App. A, pp. 11-13). The arresting officer warned petitioner "of his right to counsel, and to telephone counsel or friends and that anything he might say might be used against him in court" (P. App. A, p. 16). He was also told he could use the telephone in police barracks nearby, for there was no telephone in the shop. He was not warned at this time, more than a year prior to *Miranda* v. *Arizona,* 384 U.S. 436, that, if he could not afford an attorney, one would be appointed for him. Thereafter, upon a search of the premises, the arresting officer seized stolen property described in the warrants. While on the premises of the antique shop, immediately after the arrest, petitioner made statements which could have constituted admissions. These included statements "(1) that the Witch's Brew 'was his [Wilbur's] establishment.' (2) That he had recently sold the contents and (3) that he could not recall from whom he had purchased various items found in the shop" (P. App. A, p. 15, fn. 6).

Petitioner did not testify at the trial, and the trial judge "instructed the jury that where there is possession of stolen property by a defendant soon after a theft, and the possessor 'offers no explanation as to his possession, there is a presumption that he stole it.' Such possession, . . . 'if no explanation is given or an unsatisfactory account is given, is presumptive evidence of guilt' " (P. App. A, p. 17). The judge also "charged specifically that Wilbur had a constitutional privilege not to testify and that 'the fact that Wilbur did not take the stand does not give you [the jury] the right to draw an unfavorable inference therefrom' " (P. App. A, p. 18). After petitioner's conviction he appealed to the Supreme Judicial Court of Massachusetts, which affirmed the decision of the trial court (P. App. A, p. 19).

Argument.

The decision of the Supreme Judicial Court is manifestly correct, and therefore the petition for certiorari should be denied, for the following reasons:

(1) The record affirmatively demonstrates that petitioner had funds to secure counsel and that he intelligently waived his right to remain silent and to counsel. The Massachusetts court held that "[t]here was no reasonable basis for suspecting that he was indigent and every affirmative indication that he was in a position to employ counsel if he wanted an attorney" (P. App. A, p. 16). In *Miranda* v. *Arizona,* 384 U.S. 436, 473, at footnote 43, this court stated:

> "While a warning that the indigent may have counsel appointed need not be given to the person who . . . is *known to have ample funds to secure one,* the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability *when there is any doubt at all on that score.*" (Emphasis added.)

The record affirmatively demonstrates that petitioner was gainfully employed by the Commonwealth as a natural resource officer, and he was wearing the uniform of his office at the time of his arrest. As a natural resource officer empowered with "all the authority of police officers and constables, except the service of civil process," he cannot be regarded as ignorant of his rights.

Moreover, the testimony of the arresting officer clearly indicates that petitioner was aware of his rights and chose to waive his right to remain silent and to counsel. Thus the arresting officer testified:

> "A I told him we were conducting an investigation. I said, 'You are a law enforcement officer.' I

said, 'This might sound,' words to the effect, silly. 'Me telling you.' But I said, 'But you don't have to say anything. If you do say anything it can be used against you and you have a right to a lawyer. You have a right to have a phone call and if you want to make a phone call I will take you down to the Dartmouth Barracks now.' And I asked him three times if he understood this.

"Q And what did he say?

"A He said, 'Yes.' He said, 'It's all right.'" (H. Tr.[2] 88.)

The above uncontradicted testimony was corroborated by another arresting officer (T. Tr.[3] 132). See also T. Tr. 59, 164.

The decision of the Massachusetts court in no way suggests that the *Miranda* warning should not be given simply because a defendant is known to be solvent. Indeed, the court stated: "[W]e, of course, do not suggest that police officers should not give the full *Miranda* case warning merely because they know a particular defendant to be abundantly solvent. On the contrary, we think that the only safe course for law enforcement officers is to apply the rules of the *Miranda* decision, even if in the particular case attention to some aspects of those rules may seem unnecessary as a practical matter" (P. App. A, p. 17, fn. 8). However, keeping in mind the date of the arrest here (long before *Miranda*), and the record's clear showing that the petitioner was not insolvent and that he knew his rights, the Commonwealth submits that the lack of warning regarding the rights of an indigent was not error. See *State*

[2] "H. Tr." refers to the transcript of the hearing on the motion to suppress.

[3] "T. Tr." refers to the trial transcript.

v. *Gray,* 268 N.C. 68, 80-83 (1966), cert. den. 386 U.S. 911. Petitioner does no more than try to contradict these facts.

(2) The presumption of guilt arising from the unexplained possession of recently stolen goods is constitutionally permissive consistent with the decisions of this court. Petitioner's argument that the trial judge cannot comment on a defendant's failure to explain possession of recently stolen goods is contrary to all precedent. Similar presumptions and permissible inferences have been upheld by this court in *Yee Hem* v. *United States,* 268 U.S. 178, 183-185 (possession of opium in absence of satisfactory explanation creates presumption of concealment with knowledge of unlawful importation) and *United States* v. *Gainey,* 380 U.S. 63, 65-68, 70-71 (presumption of guilt arising from unexplained presence at site of illegal still). In these cases as well as in this case there is a rational connection between the fact proved and the ultimate fact presumed. Accordingly, all judicial precedent indicates that there is no violation of the defendant's due-process rights. See *Anglin* v. *State,* 244 Md. 652, 656-663 (1966), for collection of cases. The instruction by the trial judge in this case based on clear precedent is in no way a comment on defendant's right to remain silent within the holding of *Griffin* v. *California,* 380 U.S. 609, 612-615. Indeed, the trial judge specifically further instructed the jury that Wilbur had a constitutional privilege not to testify and that "the fact that Wilbur did not take the stand does not give you [the jury] the right to draw an unfavorable inference therefrom" (P. App. A, p. 18).

As the Massachusetts Supreme Judicial Court held (P. App. A, pp. 18-19), the explanation of a defendant's possession may come from someone other than that defendant. Should it happen that a defendant has no one but himself to offer an explanation, his misfortune is due not to any un-

constitutional compulsion to testify, but to the force of circumstances. *Yee Hem* v. *United States, supra,* 185. *United States* v. *Gainey, supra,* 70-71.

In any event, the instructions of the trial judge were manifestly correct, consistent with all precedent, and in no way an improper comment on the petitioner's right to remain silent.

Conclusion.

For the foregoing reasons it is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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